

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

USA,)
)
 Plaintiff,) 2:08-CR-00066-RK-1
)
 vs.) Philadelphia, PA
) February 24, 2012
 WILLIAM KING, M.D.,)
)
 Defendant.)

TRANSCRIPT OF MOTION FOR GARNISHMENT ORDER
BEFORE THE HONORABLE ROBERT F. KELLY
UNITED STATES DISTRICT JUDGE

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1 IN UNISON: Good morning, Your Honor.

2 THE COURT: Counsel, please state your name for the
3 record.

4 MR. BIDDLE: For Mr. King, Bill King, the doctor,
5 who's absent, Robert W. Biddle and it's by permission of the
6 Court. He's incarcerated, declined to be writted in.

7 MR. MINNI: Good morning, Your Honor, again. Joseph
8 Minni, assistance U.S. attorney for the government. Also
9 seated at the counsel table is Katherine Restrepo of my office
10 who --

11 THE COURT: All right.

12 MR. MINNI: -- will assist me in this case.

13 THE COURT: The matter here is the motion of the
14 United States for a garnishment order. You may proceed.

15 MR. BIDDLE: Well, I guess I'll proceed. I know the
16 government has argued that it's our burden to oppose the writ
17 so we'll move forward.

18 Your Honor, the issue before the Court is whether the
19 writ should be granted and on what terms and within what
20 framework. And at this point, I'll address, you know, all of
21 the issues, *seriatim*, that we see before the Court. The
22 starting point is that the government is seeking to enforce an
23 order. That's the initial framework. They're seeking to
24 enforce the Court's judgment which, of course, is on the
25 docket sheet, ECF 67. And that's the foundation, if you will,

1 the bedrock on which the action is based here.

2 The Court held that the defendant must make
3 restitution, which is required. That was a prerequisite that
4 there had to be restitution, given the verdict of the jury.
5 And provided a total amount, 780,000 dollars, and also
6 provided a schedule in the schedule of payments, which is page
7 7 of the Court's order. Rather than checking box A which is a
8 lump sum payment due immediately, that is to say the whole 780
9 being due immediately, the Court said that a payment was to
10 begin immediately on a particular schedule; that is to say,
11 twenty-five dollars per quarter toward the fine.

12 And then, once he's released from custody, which will
13 occur approximately in the next couple of months -- I
14 understand that he's expected to be released on or about May
15 1st of this year and he'll be living in North Carolina -- he's
16 to make 500 dollar monthly installment payments. So
17 logically, Your Honor, our position is that the order both
18 includes an amount and terms; that is to say, payment terms.
19 Just as when the Court sentences a defendant it imposes a
20 sentence, a period of time for incarceration, but also will
21 state when that sentence should begin.

22 For example, if the defendant's not incarcerated, the
23 Court will say you're either remanded immediately or you have
24 a certain number of days to self-surrender. And, in one of
25 those cases, the government's required to respect the date

1 that's given for the defendant to show up at Bureau of
2 Prisons. If the Court says he's got thirty days, he's got to
3 show up by the thirtieth day. If he shows up on the thirty-
4 first day, Your Honor, the government can get a bench warrant
5 and seek his arrest. The marshals can go out and get him.
6 But they can't pick him up on the twenty-ninth day and say
7 we'd like you to begin serving your sentence early. There's a
8 sentence for a certain period of time and you're going to
9 serve that in the Bureau of Prisons and you've got to start
10 serving it now because we want you to serve it now. That
11 would not be allowed.

12 And by analog, that's what the government's doing
13 here in this case. Mr. -- Dr. King is way ahead on his
14 payments.

15 THE COURT: Okay.

16 MR. BIDDLE: The latest printout --

17 THE COURT: Is that the sum and substance of your
18 argument? That we have a payment schedule and that's it?

19 MR. BIDDLE: No. No, there's a lot more, Your Honor.

20 THE COURT: What's the rest?

21 MR. BIDDLE: Okay. The second part of the argument,
22 Your Honor, is that if the Court does order -- well, let me
23 note first. We object to accounts -- retirement accounts
24 being levied, okay? There are other circuit courts -- to my
25 knowledge not the Third Circuit -- which has found that post-

1 Mandatory Victims Restitution Act, that accounts can -- that
2 retirement accounts can be levied. But we're maintaining an
3 objection to those accounts being levied. But that's not my
4 principal argument. My next argument, Your Honor, is that the
5 government's collection of the defendant's accounts should be
6 limited to twenty-five percent. That is to say only twenty-
7 five percent on a monthly basis on the payments that he'll be
8 getting from the retirement account should be levied.

9 Now, that's, in fact, what happened in the Miller
10 case, which is one of the cases cited on another point for the
11 gover -- in the government's brief. In the Miller case, the
12 Court said, under the statute, that it was not going to permit
13 the government to collect more than twenty-five percent of the
14 funds that were available to be collected. Another case that
15 speaks of that twenty-five percent cap is the McClanahan case.
16 That's 2006 U.S. Dist. LEXIS 34042. That's a Southern
17 District of West Virginia case from 2006.

18 Now, frankly, Your Honor, there is a split in the
19 cases. There are some cases that say we're not going to deem
20 the payments from a retirement account to be the type of
21 income that is referred to in the twenty-five percent cap
22 cases and the twenty-five percent cap statute. But, Your
23 Honor, given that Dr. King is mostly likely not going to be
24 able to practice medicine, he's going to be living on Social
25 Security and any additional income, at this point -- his wife

1 has divorced him and she's taken a good hunk of the retirement
2 accounts -- that this is what he would need to live on. So
3 that there's both a statutory and legal basis to find that the
4 cap should be twenty-five percent.

5 And furthermore, Your Honor, there's a specific
6 provisions, 28 U.S.C. Section 3013. That's the hardship
7 provision under the Federal Debt Collection Procedures Act.
8 That allows the Court to fashion a remedy that's just and fair
9 under the circumstances. Dr. King is sixty-six. He's
10 entitled to get payments from the retirement plan at this
11 point. So -- and the government would be standing in his shoes
12 in trying to garnish the payment. It's analogous to if he was
13 working, if he was able to get a job, whether it was in a --
14 at a hospital as an orderly or whatever, the government's
15 ability to collect that payment stream would be limited to
16 twenty-five percent.

17 So, Your Honor, due to the hardship provision 3013
18 and the twenty-five percent cap provision, which has been
19 applied by other courts in a case the government as well as
20 this -- in the Miller case and the McClanahan case, the Court
21 should limit the amount of money that's being taken out to
22 twenty-five percent.

23 The next point is, Your Honor -- and this was briefed
24 by us previously in our supplemental sentencing memoranda that
25 was filed before sentencing. The current view is that

1 restitution is a form of punishment, Your Honor. That it's
2 viewed through the lens of the eighth amendment. Now, there
3 are numerous cases that say well, in particular cases, on
4 particular facts, you know, the particular sentence or the
5 particular restitution amount or what have you, is not
6 punish -- doesn't -- isn't grossly disproportional. It's not
7 sufficient to be cruel and unusual punishment. My point about
8 that is that it's up to the Court, in the final analysis, to
9 determine the punishment.

10 Now, how that punishment is carried out, yes, is left
11 to the Bureau of Prisons. The court decides the sentence and
12 it's up to the Department of Justice, the Bureau of Prisons to
13 determine how it's carried out. But it seems doubtful that
14 congress would have turned over the imposition of punishment
15 as to the payment of restitution to the Department of Justice.
16 And -- in fact, the statutes provide, under the restitution
17 statute, that it's to the Court to set the payment schedule.
18 And it's the Court to determine when restitution payments
19 should be made. And that's how it should be under the eighth
20 amendment.

21 So, our argument is that to allow -- it's not just a
22 technical reading of the statute and the cases don't fairly
23 address this is that under the eighth amendment and the --
24 interpreting the current statutes, it's up to the Court to
25 determine the sentence and the -- and whether the eighth

1 amendment applies. Now, we're not objecting in total to -- on
2 an eighth amendment ground to payment of restitution; it's got
3 to be paid. But it's got to be paid consistent with the
4 punishment that Dr. King has already suffered, three years'
5 incarceration. And the fact that half of his retirement is
6 already gone because his ex got it lawfully in the divorce and
7 that to punish him further by essentially requiring him to
8 rely solely on his Social Security payments, would implicate
9 the eighth amendment. I hesitate to argue that it would be
10 grossly disproportional but my point is, Your Honor, it's up
11 to the Court to determine this. It should not be left up to
12 the government and that's why it's important to recognize the
13 authorities which say that restitution is analyzed as a form
14 of punishment.

15 THE COURT: Okay.

16 MR. BIDDLE: It's not just remedial.

17 THE COURT: What's your next point?

18 MR. BIDDLE: And I'm sorry. Just the citation to the
19 twenty-five percent is 15 U.S.C. 1673.

20 The last issue I have, Your Honor, is that we filed,
21 at least three times in this case, requests for a hearing and
22 the last answer of a garnishee was file on June 17th, 2011,
23 okay? That was, obviously, several months ago, about nine
24 months ago. The government had sent a letter to the Court,
25 prior to that time, asking leave -- okay. The government

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1 filed a letter with the Court on April 18th which was about --

2 THE COURT: All right. Come one.

3 MR. BIDDLE: -- about two months before that. It was
4 untimely, Your Honor. Our hearing is untimely, basically.

5 It's similar to the Speedy Trial Act. We have regularly asked
6 for a hearing here. The government took no action, the Court
7 took no action for nine months. The statute provides specific
8 deadlines. There are numerous cases that say if you ask for a
9 hearing in an untimely fashion, okay, it's denied. The
10 defendant -- if they wait more than twenty days beyond one of
11 the triggering points, you lose.

12 THE COURT: All right.

13 MR. BIDDLE: And there were a number of cases that
14 say that.

15 THE COURT: Okay.

16 MR. BIDDLE: And here, the statute says the hearing
17 is to be held promptly or as soon as practicable at such time
18 as all the answers and the garnishees have filed, which they
19 did, last summer. And it's now been nine months.

20 THE COURT: All right. Let's --

21 MR. BIDDLE: So it's untimely and that final argument
22 is our position.

23 THE COURT: All right. Let's hear what the
24 government says.

25 MR. BIDDLE: Thank you.

1 MR. MINNI: Your Honor, thank you. If I may approach
2 the podium for this argument.

3 THE COURT: Yes. Sure.

4 MR. MINNI: Your Honor, I'll make my comments brief
5 here. The whole starting point in this analysis for this
6 garnishment of these -- the garnishments of these accounts,
7 which today, Your Honor, are worth approximately 258,000
8 dollars. When we first started out in this case, Your Honor,
9 these accounts were worth in excess of 539,000 dollars. What
10 the government found out during the course of this case was
11 seven days -- seven days after sentencing this case, Dr. King
12 filed a divorce action in Maryland or consented to a divorce
13 action in Maryland. On the very same day of the filing of the
14 divorce action, he filed with the complaint -- or with his
15 answer, an agreement -- a property settlement agreement where
16 half of his assets, including his retirement accounts, were
17 transferred to his wife.

18 The government has spent several months reviewing --
19 awaiting subpoenaed records trying to contact the wife's
20 divorce lawyers, trying to get information to determine what
21 happened and why the money was transferred seven days after
22 sentencing. So Mr. Biddle raised certain issues about the
23 delay here and saying this hearing is untimely. Well, part of
24 the delay resulted in us because of our investigation in this
25 case.

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1 But what this case really deals about, Your Honor, is
2 the payment schedule. Your Honor's payment schedule deals
3 specifically with payments to begin immediately. This is not
4 a case, Your Honor, where payments are deferred until Dr. King
5 gets out of prison. This is not a case where payments are
6 deferred until this Court can determine what his financial
7 status is down the road. Payments are to begin immediately.
8 The payment order in this case clearly provides he pays in
9 prison -- or he should pay in prison -- and he pays when he
10 gets out a specific sum.

11 However, Your Honor, that provision, and the law
12 that's cited in our brief, does not preclude the government
13 from taking additional action to go after defendant's
14 available assets for the recovery of restitution for victims.
15 The cases that we cited in our brief are well established.
16 The defendant only is able to cite one case, the Texas case of
17 Roush, that holds to the contrary. But, as pointed out in our
18 brief, Your Honor, the Roush case is not applicable here. You
19 have the Aurora decision from the District of New Jersey and
20 the Third Circuit's nonprecedential decision in Shusterman,
21 which says Roush does not apply in this situation because
22 Roush did not have a payment immediately provision.

23 But what Dr. --

24 THE COURT: When you say payment immediately, are you
25 talking about payment of the entire sum or payment of --

1 MR. MINNI: Either payment of the entire sum or
2 payment of the debt. In other words, payments are due now.
3 There's no deferment. You've got to start paying now. And
4 the Court's payment plan, as referenced in Rourke (ph.) and
5 the other district court decisions cited in our brief, the
6 payment plan, Your Honor, essentially acts as a floor. And
7 when a sentencing court says payments are to begin immediately
8 or are due immediately or are due in full immediately, that
9 means the debt is due now.

10 THE COURT: But if the payments are 500 dollars a
11 month and a government sees an asset that it can get more
12 from, are they restricted from going after the asset that --

13 MR. MINNI: No, Your Honor. There's only one
14 decision that says to the contrary and that is Roush. All the
15 other cases cited in the government's brief said the
16 government, by all means, is allowed to go after, garnish,
17 levy upon, execute against other available assets of the
18 defendant to satisfy the court's restitution order or the
19 financial judgment. Roush also, Your Honor -- it's not
20 pointed out in any of the briefs but Roush actually was
21 overruled by the Fifth Circuit in a later decision called
22 Ekong. If I may, Your Honor, I can get to the EKong site.
23 518 F 3d. 285 (5th Cir. 2007). EKong was a -- Roush was a
24 2006 case. Roush is essentially no longer good law. Even in
25 the Fifth Circuit.

1 THE COURT: Well, I don't --

2 MR. MINNI: The government does not dispute these --

3 THE COURT: I didn't check to see what -- I mean,

4 restitution is normally ordered in a lump sum.

5 MR. MINNI: Not nece -- well, it's ordered -- lump

6 sum in the judgment itself.

7 THE COURT: Right.

8 MR. MINNI: Meaning the amount that the defendant

9 defrauded --

10 THE COURT: Right.

11 MR. MINNI: -- to the amount of losses caused by the

12 defendant. That's the restitution order, Your Honor. That's

13 the judgment amount. But there's a second step to the process

14 as set forth under the restitution laws. And that -- under the

15 Third Circuit and all the other circuit decisions, the Court

16 has to, in that second step, impose a payment plan. How is

17 the defendant going to fulfill that judgment. That's why, at

18 the sentencing hearings, Your Honor, we go through some kind

19 of financial analysis, whether you'll pay 25 dollars per

20 quarter while you're incarcerated and you'll pay 200 dollars a

21 month while on supervised release.

22 THE COURT: Right.

23 MR. MINNI: Because there has to be a payment plan to

24 fulfill the Court's restitution judgment.

25 THE COURT: Right.

1 MR. MINNI: The issue here is notwithstanding a
2 payment plan, even if the defendant is compliant with that
3 payment plan --

4 THE COURT: Right.

5 MR. MINNI: -- can the government still go ahead and
6 go after him. Seize, levy upon, execute against other
7 available assets to satisfy the court's restitution order.
8 Clearly the court's say the government, with the exception of
9 Roush, clearly the Court's have all held that the government
10 is not restricted and can go after other assets, including a
11 bunch of those cases we've cited in our brief actually deal
12 with garnishments.

13 There is one other case, Your Honor, that I didn't
14 cite but I came across. It's Bancroft, B-A-N-C-R-O-F-T, out
15 of the District of Maryland, 2010. I'm sorry. Western
16 District of Michigan, 2010. 2010 Westlaw 4536785. Which
17 notes hat courts have overwhelmingly held that the
18 government's not restricted by a payment plan and oh, by the
19 way, Roush has -- in effect, has been overruled by the Fifth
20 Circuit. This position, Your Honor, has been accepted by the
21 Third Circuit in Shusterman. While not precedential decision,
22 Shusterman's analysis has been adopted by the -- recently by
23 the district court in New Jersey and we ask that the Court
24 follow that rationale. It says look, the Court's going to say
25 it's due immediately or payable immediately; the government

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1 can go after available assets, notwithstanding a payment plan.
2 If I may just respond to a couple of other points raised by
3 Mr. Biddle in his argument. He talks about a twenty-five
4 percent limitation on the levy and that is under the
5 consumer --

6 THE COURT: Which part of this is -- would that apply
7 to? Or which of these garnishees?

8 MR. MINNI: Yes. What Mr. Biddle is attempting to
9 argue for Dr. King is that the government is capped at twenty-
10 five percent of all of the funds that are in the accounts.
11 That's not true, Your Honor. That's not what the law says.
12 The provision that Mr. Biddle cites -- and I always get this
13 wrong. It's the Consumer Credit Protection Act, the CCPA, 15
14 U.S.C. 1673. That talks about twenty-five percent of
15 disposable earnings. And if necessary, I will follow and send
16 the Court cases. The cases hold that garnishment of funds in
17 an account, that does not constitute earnings.

18 THE COURT: Yes.

19 MR. MINNI: The garnishee --

20 THE COURT: I didn't think he was applying it to
21 those but --

22 MR. MINNI: I think that's what he was trying to
23 apply that to, Your Honor.

24 THE COURT: IS that --

25 MR. MINNI: Maybe clarify that --

1 THE COURT: You were applying that to everything, Mr.
2 Biddle?

3 MR. BIDDLE: Your Honor, to clarify, I was applying
4 it to the payment of funds out of the account in the regular
5 monthly installments --

6 THE COURT: Okay.

7 MR. BIDDLE: -- that one would get if you retire.

8 THE COURT: All right.

9 MR. BIDDLE: In other words --

10 THE COURT: Okay.

11 MR. BIDDLE: -- not a lump sum but a percentage.

12 MR. MINNI: Oh, clearly, Your Honor, if we were
13 attempting to levy garnish upon the disbursements going to Dr.
14 King, clearly Title 15 says we're limited to twenty-five
15 percent. But Your Honor, we're going after the corpus.

16 THE COURT: All right.

17 MR. MINNI: The corpus are subject to the writ which
18 does not constitute earnings.

19 THE COURT: You'll send me the cases you have on
20 that?

21 MR. MINNI: Yes, Your Honor. Mr. Biddle also
22 referred to 28 U.S.C. Section 3013. That is part of the
23 Federal Debt Collection Procedures Act which governs the
24 collection provisions here today even though we have a
25 criminal case. The FDCPA does apply here, as pointed out in

1 our brief. He referred to 3013 as a hardship provision.
2 3013, Your Honor, is not a hardship provision. 3013 -- and
3 I'm sorry, I don't have my Title 28 book here with me this
4 morning because I didn't know this issue was going to come up.
5 3013 is a catchall provision. It says that the court, in
6 enforcing an enforcement remedy under this provision, under
7 the FDCPA, can issue any additional orders, writs or other
8 types of relief to ensure compliance with an order under that
9 title. There's nothing about hardship in there.

10 It's just essentially -- it's a catchall provision
11 allows the Court to fashion appropriate relief where we can't
12 fit anything in any of the other provisions. I will further
13 expand on the hardship. Hardship is not an issue here, Your
14 Honor. The issue here is an exemption. In criminal cases,
15 there is no exception for hardship, inability to pay after we
16 take your money. That's why you have the twenty-five percent
17 limitation on wage garnishments. And there are cases that say
18 that, Your Honor, and they were pointed out in the brief that
19 we submitted in this case.

20 There are eleven specific types of exempt property
21 from garnishing in criminal cases. Hardship is not one of
22 those exemptions. If congress wanted hardship to apply, as
23 pointed out in our brief, congress would have said the court
24 can consider the hardship. Now, of course, under DOJ policy,
25 Your Honor, we're not supposed to put a defendant, a judgment

1 debtor, on the public welfare rolls. This is not the case
2 here. Dr. King is going to be out of prison in a few months,
3 he's going to be living with his daughters in North Carolina,
4 we think. He's going to be receiving Social Security benefits
5 because he's of age. That's not hardship. He has an income
6 stream, he has property which he's able to live. So I don't
7 think there's any type of hardship issue here whatsoever.

8 The last two issues, Your Honor -- or actually the
9 last issue is the exemption issue for the ERISA qualified
10 pension accounts. We've argued that in our brief. The cases
11 are there. While Mr. Biddle is absolutely correct, the Third
12 Circuit has not ruled or opined on this issue, the cases
13 throughout the country in circuits and in district courts are
14 replete, well-established on this issue. ERISA qualified
15 retirement plans, IRAs, 401Ks are not exempt from garnishment
16 to collect federal restitution or federal fines.

17 Judge Newcomer in a case years ago, I believe in
18 2001, in the Grico (ph.) case which I cited in the brief,
19 applied the same analysis to a criminal fine. Your Honor, we
20 collect fines in the same manner as restitution, so says 3664,
21 the same analysis and rationale should apply. The fact that
22 the Third Circuit -- although all the other circuits have
23 ruled favorably for the government on this issue, should not
24 preclude the government from garnishing these accounts at this
25 time.

1 Your Honor, what we're trying to do here is we're
2 trying to get money for victims. The law requires us to
3 enforce restitution aggressively to the benefit of the victims
4 and to the fullest extent possible. And by allowing the
5 government to proceed against these accounts, as authorized
6 under law, enables the government to fulfill its statutory
7 mission in collecting restitution.

8 If I may have one second, Your Honor?

9 Ms. Restrepo actually reminded me. If you look at
10 the Court's payment plan, Your Honor, as set forth, would not
11 result in full payment of restitution within the twenty year
12 life of the debt. So that's why we need to go -- be able to
13 look and go after other assets where available to fulfill that
14 statutory mission. Thank you, Your Honor.

15 THE COURT: How long do you need to get me that
16 supplemental memorandum?

17 MR. MINNI: A couple of days if Your Honor would just
18 want a letter brief.

19 THE COURT: Yes. It can be in the form of a letter.

20 MR. MINNI: I'll just -- these are simple. I'll just
21 line up the cases for Your Honor on that one particular issue.

22 MR. BIDDLE: Do we have a right to --

23 THE COURT: How much time would you like to respond
24 to whatever he's filed?

25 MR. BIDDLE: I'd like two weeks, Your Honor.

1 MR. MINNI: It's fine with me, Your Honor.

2 THE COURT: Okay. Two weeks.

3 MR. BIDDLE: Can I reply briefly to the oral
4 argument?

5 THE COURT: Um-hum.

6 MR. BIDDLE: Your Honor, the Court had a question
7 about 30 -- 28 U.S.C. 3013. And the assistant described some
8 of the provisions but it provides -- and I'm reading from the
9 text -- that it allows the Court to make an order "denying,
10 limiting, conditioning, regulating, extending or modifying the
11 use of any enforcement procedure under this chapter." So it
12 specifically says limiting, conditioning or regulating.

13 So as I said at the start of the argument, the
14 question is what's the government's right to do it and what's
15 the Court's options. Even if the Court has -- finds that it
16 has discretion or power to allow the government to essentially
17 leapfrog or go over and accelerate the payment plan here --
18 and, as I said, Dr. King is way ahead on his payment plan.
19 The Court should consider, under this provision, whether,
20 under the eighth amendment and the facts that the Court heard
21 in the trial and at sentencing, it would be appropriate.

22 The Court asked the assistant whether it would be
23 appropriate to garnish assets that were, essentially, newly
24 discovered. But these assets were not newly discovered.
25 These were fully disclosed in the presentence report. The

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1 government was aware of it and if they believe that they had a
2 garnishment action and they were permitted to pursue it, they
3 could have filed that the day after sentencing. And the fact
4 that they waited and that they've waited for the past nine
5 months, is not the Court's fault, it's not the defense
6 counsel's fault. The government chose to take that course of
7 action. And the Court is permitted to consider the totality
8 of the circumstances in deciding what is appropriate
9 acceleration.

10 The Court made a finding at sentencing based on the
11 existence of these accounts, when they had twice as much money
12 in them then as they do now, that the payment plan in the
13 Court's order, in the judgment and commitment order, was
14 appropriate: 25 dollars a month during incarceration, 500
15 dollars a month once the defendant is released.

16 THE COURT: Yes --

17 MR. BIDDLE: And the appropriate time --

18 THE COURT: It would never -- I never had this
19 before. It would never occur to me that -- in that, that the
20 government, in entering into a payment schedule, that the
21 government has given up its rights to go after the lump sum
22 if -- it's just -- in most of the these cases, there never is
23 a lump sum, there's no possibility of it. The payment
24 schedule, I have always looked at, was a consideration to the
25 defendant. You know, was to his benefit or her benefit.

1 MR. BIDDLE: Absolutely, Your Honor. But it is part
2 of the sentence. And why would congress -- and there's a lot
3 of discussion in the cases, there's a huge amount of case law
4 on these various issues. But why would congress have written
5 these very detailed procedures for restitution where the Court
6 is supposed to consider the financial resources of the
7 defendant and consider whether a payment plan is appropriate
8 and there are provisions under the restitution statute for
9 going back and revisiting that if, for example, a defendant
10 wins the lottery and, you know, obviously, that money needs to
11 go the victims.

12 Why would they have done all of that if the
13 government was free at any time to, essentially, trump that by
14 bringing, at its leisure, an action for garnishment which is
15 clearly what occurred here. They chose not to bring it right
16 after sentencing, they waited for a number of months or years,
17 they started the action last year, then it was in limbo for
18 nine months. That can't be what Congress contemplated. It's
19 got to be, Your Honor, to read the sections in pari materia,
20 to read them together, to make them both sensible, it's got to
21 be the government gets to do what its' doing when the
22 defendant fails to meet his obligations to the Court, when
23 he's derelict.

24 THE COURT: Right.

25 MR. MINNI: Your Honor, if I may respond --

1 THE COURT: What part -- what part, if any, is the
2 divorce and the property settlement with assets that might
3 have been used to satisfy this judgment?

4 MR. MINNI: There are two types --

5 THE COURT: What part does that play in this?

6 MR. MINNI: Your Honor, there were two types of
7 assets that we were looking at that we -- that the government
8 was looking at in connection with the divorce proceeding.
9 Number one was the -- I'll call it the marital residence which
10 was transferred completely to the wife at or near the time of
11 sentencing.

12 THE COURT: The government didn't go after any of
13 that?

14 MR. MINNI: Your Honor, based on -- it was based on
15 some equity considerations in the property and if the property
16 was returned, if the transfer was revoked and it was cancelled
17 as fraudulent, the property would go back to entireties
18 property. There are some legal issues that came up with it.
19 But eventually, Your Honor, it dealt with an equity issue as
20 well. We haven't closed the book on it but we thought it was
21 more important to look at the garnishment issue of retirement
22 accounts.

23 And then secondly, Your Honor, the retirement
24 accounts in connection with the divorce proceeding. The
25 government has still not closed the book on that. The

1 government's still going to review -- further review
2 information regarding the divorce proceeding. We may take
3 discovery against the wife and the daughters because the
4 daughters also received property from the defendant at or near
5 the time of the sentencing.

6 Your Honor, I'd like to make one final point. Mr.
7 Biddle makes a big deal about how the government did nothing
8 for nine months. And Your Honor, during that time, the
9 government did take action. We should have, perhaps,
10 communicated more regularly with the Court about statutes of
11 the matter. But Your Honor, I make two points on this.
12 Number one, Mr. Biddle, although he does raise the issue of
13 delay, he hasn't raised issue of whether or not any of it has
14 prejudiced his client. His client is sitting in jail. The
15 garnished funds have not been paid over to the government.
16 They were staying the in account earning interest.

17 And this was Mr. Biddle's hearing request. There was
18 no communication from Mr. Biddle or the defendant to the Court
19 saying hey, Judge, can I have my hearing it's been nine months
20 now, it's been six months now. So it's a prejudice type of
21 argument as well, Your Honor. The fact is we're here today,
22 the issues have been briefed and the matter is for the Court's
23 decision once we get these final rounds of briefs to the
24 Court.

25 THE COURT: All right.

1 MR. MINNI: Thank you, Your Honor.

2 THE COURT: Okay.

3 MR. BIDDLE: Thank you, Your Honor.

4 THE COURT: All right. Thank you. I will wait for
5 your --

6 MR. MINNI: Thank you, Your Honor.

7 THE COURT: -- submissions.

8 THE CLERK: All rise.

9 (Court is adjourned)

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2 C E R T I F I C A T I O N

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4 I, Zipporah Geralnik, the court approved
5 transcriber, do hereby certify the foregoing is a true and
6 correct transcript from the official electronic sound
7 recording of the proceedings in the above-entitled matter.

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Z. Geralnik

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